1972

Fairfield Irrigation Company, Et Al v. M. Kenneth White and Ralph M. Smith : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FAIRFIELD IRRIGATION COMPANY, a corporation, REED CARSON, WINSTON DUBOIS, ERNEST CARSON, TRUMAN CARSON, HYRUM WILKINSON, VERL CROSSMAN, CLIFF CARSON, BLANCH ARMSTRONG, RALPH L. DUBOIS, NORMAN ERICKSON, RULON CARSON, BEN McKINNEY, AGNES EVANS, RUSSEL CARSON, IDA WALTERS, LENARD RUCKER, JAMES KING, CLARA CLOVER, TRUMAN CARSON, as Trustee, and HILLSIDE STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Plaintiffs and Appellants,

vs.

M. KENNETH WHITE and RALPH M. SMITH,

Defendants and Respondents,

vs.

COOPERATIVE SECURITY CORPORATION, a non-profit corporation of the State of Utah,

Additional Defendant in Cross Claim.

Case No. 12,817

BRIEF OF RESPONDENT

Appeal from Order of the Fourth District Court
for Utah County
Hon. Joseph E. Nelson, *Judge*

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AUTHORITIES

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NATURE OF THE CASE

Appeal from the Order of the District Court in post-judgment contempt proceedings dismissing plaintiffs and appellants' Amended Petition For

Order To Show Cause directed against defendant and respondent M. Kenneth White and denying the relief sought by said appellants therein.

DISPOSITION IN LOWER COURT

The trial court issued an Order To Show Cause directed against defendant M. Kenneth White based upon the Amended Petition of plaintiffs, ordering him to appear and show cause why he should not be punished for contempt for an alleged violation of the Decree made and entered on the 1st day of June, 1965. A hearing was held, and based upon the evidence presented at the hearing the trial court found that defendant M. Kenneth White did not violate the terms of its Decree dated June 1, 1965 and that said defendant was not guilty of contempt and, accordingly, entered its Order dismissing plaintiffs' Amended Petition For Order To Show Cause and denying the relief sought therein. The narrow issue on this appeal is whether there is any substantial evidence to support the Findings of the trial court. If so, the Order of the trial court must be affirmed.

RELIEF SOUGHT ON APPEAL

Respondent M. Kenneth White seeks to affirm the Order made and entered by the trial court dismissing appellants' Amended Petition For Order To Show Cause and denying the relief sought therein. Hereafter plaintiffs and appellants will be collectively referred to as "Fairfield" and defendant and respondent M. Kenneth White will be referred to as "White."

STATEMENT OF FACTS

White cannot agree with Fairfield's Statement Of Facts for two basic reasons:

(1) It is impregnated with what the trial court found or did not find in its 1965 Findings Of Fact and is but a rehash of past history, now irrelevant to this proceeding since the 1965 Decree is clear and unambiguous; and

(2) It carefully selects the post 1965 facts as to the flows of the Fairfield Springs and the operation of White's well most favorable to Fairfield, contrary to the cardinal rule on appellant review.

And so White makes the following brief Statement Of Facts, which are the relevant facts on this appeal.

The discharge of the Fairfield Springs was measured by Fairfield's representatives during the period from May, 1966 through September, 1970 (Exh. 1; Tr. 13). Those measurements were plotted as hydrographs, which do not include the 0.12 second foot of water flowing from White's replacement well into either of Fairfield's ditches (Exhs. 2, 5; Tr. 17). White did not pump either of his irrigation wells in 1965 (Tr. 42) or in 1966 (R. 12A). He pumped one well intermittently from October 24, 1967 until August 10, 1970 (R. 12, 12A; Tr. 18). During the entire period of pumping the total discharge of the Fairfield Springs, as augmented by the 0.12 second foot flowing from White's replacement well into

Fairfield's ditches, did not fall below 4.10 cfs within the tolerance of the accuracy of the measurements (Exhs. 1, 2, 5; Tr. 35, 42). Likewise, in each year during which White pumped his well the discharge of the Fairfield Springs, as augmented by the flow of the White replacement well, exceeded 1600 acre feet during the period April 20 to October 20 of each year (Exh. 6; Tr. 41, 42). White's replacement well was not pumped during the post-judgment period but flowed 0.12 second foot continuously (Tr. 35) and was discharged into Fairfield's ditches (Tr. 17). Based upon the foregoing facts, the trial court found that White did not violate the provisions of the Decree made and entered herein on the 1st day of June, 1965 and that he was not guilty of contempt. Thereupon the trial court entered its Order dismissing Fairfield's Amended Petition For Order To Show Cause and denied the relief sought therein (R. 16). From such Order Fairfield filed its Notice Of Appeal herein (R. 19).

POINT I.

THE DECREE MADE AND ENTERED HEREIN ON THE 1ST DAY OF JUNE, 1965 IS CLEAR AND UNAMBIGUOUS AND THE RELIEF SOUGHT BY FAIRFIELD HEREIN SEEKS TO MODIFY AND CHANGE THE MEANING OF SAID DECREE.

The crux of this post-judgment proceeding is whether White violated that provision of paragraph 4(a) of the 1965 Decree (R. 4) which provides as follows:

"4. That the defendant White should be and he is hereby enjoined from producing any water from his two large irrigation wells which were drilled under Applications Nos. 22928 and 22826, except upon condition that he comply with the following replacement order:

"(a) That the irrigation water from Fairfield Springs be maintained at a minimum flow of 4.10 cubic feet per second through April 20th to October 20th of each year, and that the average flow be such as to yield not less than 1600 acre feet during said season, . . ."

The foregoing provision is clear and unambiguous and means exactly what it says. So long as the minimum flow of the Fairfield Springs is maintained at 4.10 cfs or above and the average flow thereof during the April 20 to October 20 period is such as to yield 1600 acre feet, White is entitled to operate either or both of his irrigation wells. If either condition is not satisfied he is enjoined from operating his wells *except* upon the condition that he replaces water to the Fairfield Springs to satisfy those conditions. And so we need only to look to the record of the evidence received at the post-judgment hearing to determine whether there is any substantial evidence to show that both conditions were satisfied during the post-judgment periods when White operated his well. If so, the decision of the trial court must be affirmed. *Charlton v. Hackett*, 11 Utah 2d 389, 360 P.2d 176 (1961).

We submit that the evidence clearly establishes that both conditions were satisfied. Thus during the entire period when White intermittently operated his well the total discharge of the Fairfield Springs, as augmented by the 0.12 cfs of water from his replacement well into Fairfield's ditches, did not fall below 4.10 cfs within the tolerance of the accuracy of the measurements (Exhs. 1, 2, 5; Tr. 42). This was admitted by Fairfield's expert witness Lawrence (Tr. 35) and is effectively conceded by Fairfield on page 5 of its Brief. Likewise in each year during which White intermittently operated his well the total discharge of the Fairfield Springs, as augmented by the flow of White's replacement well, exceeded 1600 acre feet during the period April 20 to October 20 (Exh. 6; Tr. 41, 42). Fairfield offered no evidence to the contrary, and nowhere in Fairfield's Brief does it contend otherwise. That being so, it follows that White did not violate the foregoing provisions of the 1965 Decree, nor was he guilty of contempt as the trial court properly and correctly so found. It is just that simple, and that should end the matter in this Court.

However, Fairfield does not confine its argument to the evidence presented at the post-judgment hearing nor to the language of the 1965 Decree, as we say it must. Rather, Fairfield engages in a lengthy discourse on what the trial court found or did not find in its 1965 Findings Of Fact and argues therefrom that Fairfield is the owner of all of the water which the Fairfield Springs would produce

but for the pumping of White's well, and that as a condition to White's operating his well he must replace every drop of water which the Fairfield Springs would have otherwise produced. This Fairfield argues at length without regard to the clear and unambiguous language of paragrph 4(a) of the Decree. We say that Fairfield's whole argument is an abortive attempt to indirectly modify the 1965 Decree and then urge a violation thereof under Fairfield's modified version. This the trial court would not permit Fairfield to do, and correctly so. That is the sum and substance of this appeal.

Although we are tempted to ignore Fairfield's argument as being wholly irrelevant and here end the dialogue, we feel constrained to point up the fallacy of it all. Thus at the outset of the post-judgment hearing in the court below counsel for Fairfield advised the court that it was asking for the further relief of defining the quantity of water Fairfield was entitled to take and that it was not going to press for a contempt citation (Tr. 5). The trial court became concerned with what relief Fairfield there was really seeking and reiterated that the only question for the court to determine was whether there had been a violation of the Decree (Tr. 7, 8, 10). In response to the query of the trial court as to whether Fairfield was asking for a modification of the Decree, counsel for Fairfield advised that it was not seeking a modification but just a further "refinement" of something the Decree didn't decide (Tr. 8, 9, 10).

The so-called "refinement" which Fairfield there sought and which it now urges is that White should not be permitted to pump one drop of water unless he simultaneously replaces some unascertainable quantity of water to Fairfield without regard to whether the Fairfield Springs are producing 4.1 cfs, 6 cfs or 10 cfs or whether Fairfield can beneficially use all of the waters emanating therefrom. That is a far cry from what paragraph 4(a) of the 1965 Decree says. Such refinement would not only modify the 1965 Decree but would render paragraph 4(a) thereof a nullity.

The irony of it all is exemplified by comparing the position taken by Fairfield in the prior appeal (Case No. 10,488) with its position in this post-judgment proceeding. In the prior appeal White challenged the Findings of the trial court fixing the constant minimum flow of the Fairfield Springs at 4.10 cfs and a yield therefrom of 1600 acre feet during the irrigation season as the foundation of the trial court's replacement order. In reply thereto, Fairfield on page 3 of its prior Brief stated its Point I.B as follows:

> "B. The court properly ordered appellant to add sufficient water to the spring to maintain the flow at 4.10 c.f.s. and to deliver 1600 acre feet per year."

In response to White's challenge to the finding of the trial court that the Fairfield Springs had ever produced 6 cfs, Fairfield stated on page 5 of its prior Brief as follows:

> "This however, is really an argument about an immaterial point. The court didn't order Appellant to replace 6 c.f.s., either as a rate of flow nor in connection with the total quantity. The court's order required only 4.10 c.f.s. minimum, and 1,600 acre feet — a quantity which could be delivered with an average flow of 4.37 c.f.s."

And in response to White's challenge to the 1600 acre feet, Fairfield stated as one of its sub-points on paragraph 14 of its prior Brief as follows:

> 7. The court correctly held that Respondents were entitled to receive 1,600 acre feet during their 183 day irrigation season."

In its prior opinion (*Fairfield Irrigation Company v. White*, 18 Utah 2d 93, 416 P.2d 641) this Court stated on page 95 of the Utah Reports as follows:

> "After a trial, the court entered a decree enjoining White from pumping his wells except upon specified conditions and prescribing replacement of water necessary to assure the plaintiffs the water they are entitled to under their prior claims to the water of Fairfield Springs; . . ."

This Court then went on to affirm the conditions imposed by the 1965 Decree to assure Fairfield of the waters to which it and they are entitled.

After having successfully sustained the 4.10 cfs and 1600 acre feet conditions in the prior appeal, Fairfield now comes back via a post-judgment proceeding and seeks to abrogate those conditions by

expanding upon its adjudicated rights and by imposing further limitations and restrictions on White's rights. It now seeks to prohibit White from pumping a single drop of water by means of his wells unless he replaces some imaginary quantity which the Fairfield Springs would have theoretically yielded without his pumping, whether it be 5 cfs, 6 cfs, 7 cfs or, we suppose, 50 cfs. We say that was all settled in the 1965 Decree, as affirmed by this Court in 1966, and the conditions imposed under paragraph 4(a) are those finally adjudicated necessary to assure Fairfield the waters to which it and they are entitled. Those conditions are res judicata and the law of the case and are equally binding on Fairfield as they are on White. They cannot be altered, changed, modified or refined in this post-judgment proceeding as Fairfield seeks to do. Were that not so this litigation would never end.

In *Crofts v. Crofts*, 21 Utah 2d 332, 445 P.2d 701 (1968) this Court stated the principle here controlling on page 335 of the Utah Reports as follows:

> ". . . Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding. (49 C.J.S. Judgments Sec. 1)
>
> "If a judgment can mean one thing one day and something else on another day, there would be no reason to suppose that the litigation had been set at rest. The same must be

said if the judgment can mean one thing to one judge and something else to another judge. *All are bound by the original language used, and all ought to interpret the language the same way.* No court should express an opinion of what the judgment means until the judgment is called into question by some factual situation relating thereto. *The judge who tried the case and who ought to know what he meant to say, after the time for appeal, etc., has passed cannot any more change or cancel one word of the judgment than can any other judge.*" (Emphasis ours.)

Here the judge who tried the case and who ought to know what he meant to say found in this post-judgment proceeding that White did not violate the Decree and denied the relief sought by Fairfield. To do otherwise would require a cancellation of paragraph 4(a) of theDecree, which could not be done in the court below and, we respectfully submit, cannot be done on this appeal.

While we have no quarrel with the general rule urged under Point II of Fairfield's Brief that a decree should be construed as a whole so as to give meaning to all of its terms, we do take issue with the way Fairfield goes about attempting to construe the Decree and with the conclusions it reaches therefrom.

Nowhere in Appellant's Brief does it urge that the 1965 Decree is ambiguous. We say that the Decree is clear and unambiguous and the rule of interpretation to be here employed is the rule applicable to an unambiguous judgment. In 46 Am. Jur. 2d,

Sec. 72 the rule is stated on page 363 thereof as follows:

> ". . . If, on the other hand, the judgment is not ambiguous or uncertain, the parol evidence rule applies, and the written judgment should be accepted at its face value and without speculating as to the reasoning employed in reaching the particular result."

Where a judgment is clear and unambiguous, neither pleadings, findings of fact nor verdict may be resorted to to change its meaning. *Chronister v. State Farm Mut. Auto Ins. Co.*, (N.M.), 381 P.2d 673 (1963); *Callan v. Callan* (Wash.), 468 P.2d 456 (1970). And as stated in 46 Am. Jur. 2d, Sec. 76, page 365 thereof:

> "If, however, a judgment is not ambiguous and leaves nothing for interpretation, there is no need to refer to the pleadings or other parts of the record. *It is clear that if a finding is inconsistent with the judgment proper or decretal part of the judgment, the latter must control.*" (Emphasis ours.)

Nowhere in Fairfield's Brief does it point up any ambiguity in the Decree which would justify its resort to the Findings Of Fact under the accepted rules of construction. Yet in Point I of its argument, under the guise of attempting to construe the Findings and Decree as a harmonious whole, it quotes in whole or in part or makes some reference to Findings Nos. 1, 2, 9, 10, 13, 14, 16, 17 and 26. That we say is but a rehash of past history settled a long time ago and has no part in this appeal.

The sum and substance of Fairfield's rehash of the 1965 Findings, as we view it, is

(1) that Fairfield owns all of the waters emanating from the Fairfield Springs, without limitation;

(2) that White's irrigation wells interfere with the flow of the Fairfield Springs; and

(3) that White is not entitled to pump a single drop of water unless he simultaneously replaces drop by drop the water which but for his pumping would have flowed from the Fairfield Springs.

As to (1) above, we agree that the 1965 Decree awards Fairfield the right to the use of all of the waters emanating from the Fairfield Springs which it can beneficially use. The 1600 acre feet gives Fairfield a duty of 3.5 acre feet per acre for its 454 acres of land during the irrigation season, which we believe is reasonable. In addition thereto Fairfield gets another 2.9 acre feet per acre during the non-irrigation season for 280 out of the 454 acres, which White raised in the prior appeal as being unreasonable but which was affirmed by this Court. The position of Fairfield now is that as against White and all junior appropriators from the basin it owns all of the waters of the Fairfield Springs without regard to duty or the other limitations set forth in the Decree. Paragraph 4(a) of the Decree fixed the conditions under which White can pump and assures Fairfield the waters to which it is entitled. Fairfield has an absolute guarantee of a minimum flow of 4.1 cfs

and a yield of 1600 acre feet during the irrigation season, and if nature won't provide it White must if he wants to pump either of his irrigation wells. We say that Fairfield's position here is untenable since it hangs on paragraph 1 of the Decree to the exclusion of the remainder of the Decree and thereby violates the very principle it so strenuously argues for under its Point II.

As to (2) above, one would think that Fairfield has to persuade this Court all over again that the pumping of the White irrigation wells interferes with the flow of the Fairfield Springs. That was settled back in 1965 and needs not be rehashed here. Fairfield repeatedly argues that the Decree never gave White any interest in the Fairfield Springs and charges over and over again that White has taken "our water." The fallacy of it all is that White does not divert water directly from the Fairfield Springs after the waters therefrom emanate from the underground source. Rather, White diverts water from the inter-connected underground sources some two miles away. Fairfield does not have a monopoly on the entire underground source. It is public water, and so long as Fairfield's rights are protected in accordance with the Decree White as a junior appropriator is entitled to divert water for his use. The conditions of the Decree have been maintained and Fairfield has received the water to which it is entitled.

As to (3) above, Fairfield obviously cannot get that meaning out of paragraph 4(a) of the Decree.

What Fairfield is really attempting to do is to use Finding No. 26 to change the plain language and meaning of paragraph 4(a) of the Decree. Thus on page 12 of its Brief Fairfield emphasizes that Finding No. 26 says in substance that White should be enjoined from pumping his irrigation wells at any time during any season except upon the condition that the waters of Fairfield be fully replaced with the same quantity of water. Yet on page 14 of Fairfield's Brief it acknowledges that the Decree (paragraph 4(a)) does not include that part of the language of Finding No. 26. If there is any inconsistency between the language of Finding No. 26 and paragraph 4(a) of the Decree, and we say there is not, then paragraph 4(a) of the Decree must control. Under the general rule of construction it is clear that if a finding is inconsistent with the judgment proper or a decretal part of the judgment the latter must control. 46 Am. Jur 2d, Judgments, Section 76, page 365.

We do not believe that Finding No. 26 is inconsistent with paragraph 4(a) of the Decree. Thus the first paragraph of Finding No. 26 is but a general statement of the necessity for replacement as a condition to White's operating his wells, which relates to all plaintiffs including those individual plaintiffs who have flowing wells. The last sentence thereof expressly makes the sub-paragraphs which follow the specific conditions of replacement, which are identical with the sub-paragraphs of paragraph 4 of the Decree. The first sentence of paragraph 4 of the De-

cree is the force by which White is enjoined and is specific, clear and unambiguous. To adopt the same language therein as is contained in the first paragraph of Finding No. 26 would make it open-ended and ambiguous and the specific subparagraphs which follow of necessity would qualify and limit the preceding general language; otherwise the Decree would fail for vagueness. There is simply no way by which Fairfield can distort paragraph 4(a) of the Decree to support its contention even if the rules of construction would permit it, which they do not.

POINT II.
THE EVIDENCE SUPPORTS THE FINDING OF THE TRIAL COURT THAT WHITE DID NOT VIOLATE THE 1965 DECREE, AND ITS ORDER MUST BE AFFIRMED.

Fairfield carefully selects those facts from the evidence presented at the post-judgment hearing most favorable to it and argues therefrom that White has taken substantial quantities of "their" water contrary to the spirit and intent of the 1965 Decree. It unfairly refers to the White replacement well as "leaking" 0.12 cfs when in fact it flows up through the casing and is discharged into Fairfield's ditches for its use. Fairfield says it can get to the crux of the matter by looking to the irrigation season of 1969, and then for the convenience of the Court reproduces and includes in its Brief a part of one of its graphs which is in evidence. It then erroneously asserts that White took that quantity of water represented by the shaded part of the graph.

Thus, Fairfield would have this Court believe that the fluctuations appearing on its reproduced graph on page 7 of its Brief were all caused by the pumping of White's well. The facts are as related by Fairfield's own witness Lawrence, that when the water is backed up in the spring area to force the water into Fairfield's ditches the discharge of the spring is reduced. Likewise, when the water is turned from one ditch to another (marked by red and blue vertical lines on Exhibit 2) there are fluctuations in the measured flow of the discharge of the Fairfield Springs. Thus the decrease in the measured discharge of the Fairfield Springs from May 1 to May 2, 1969, as shown by Fairfield's graph, coincided with a change from one ditch to the other (Exh. 2). The same is true for the decreases on May 12, May 26, June 9 and June 21, 1969. As a matter of fact, White did not even operate his well during the entire month of June, 1969 yet the fluctuations still occurred, and notably the decrease on June 9. Any reduction in flow resulting from changing from one ditch to the other or backing the water up over the springs cannot be attributable to White's well.

Fairfield repeatedly argues that the Decree does not permit White to take "their water" in June and replace it in October, as if that were the fact. Fairfield suggests that White purposely manipulates his well to accomplish that result, which is simply not borne out by the evidence. It picks the year 1969 to complain about White's pumping because it suits its

purposes, but it ignores the years 1968 and 1970. The facts are that White pumped the one well during parts of all of the months from May through November of 1968, did not pump in June, 1969, but did pump during each of the months of May, July, August, September, October and November of 1969. Likewise in 1970 White pumped during the months of May, June, July and August. It can hardly be said therefrom that Fairfield's argument finds any support in the evidence. In fact, Fairfield's own witness Lawrence was unable to tell one way or the other from the hydrograph of the discharge of the Fairfield Springs during the months of June and July, 1970 whether the White well was then being pumped (Tr. 33, 34).

After all is said and done, the facts still remain that during each year when White has pumped his well since the entry of the 1965 Decree the Fairfield Springs, as augmented by the 0.12 cfs of replacement water, has remained above 4.1 cfs and Fairfield has received at least 1600 acre feet of water during each irrigation season. As such White has fully complied with the conditions of paragraph 4(a) of the 1965 Decree. The lower court expressly found that White did not violate the 1965 Decree. Under the cardinal rules of review, that Finding is presumed to be valid and correct by this Court and it is Fairfield's burden here to show error. This Fairfield has wholly failed to do. The record in this case must be reviewed in the light most favorable to such Finding and should not be disturbed since the evidence clearly supports it. *Charlton v. Hackett*, supra.

Fairfield seeks on this appeal to reverse the refusal of the trial court to find that White violated the 1965 Decree. The correct rule here is that this Court should not upset the trial court's refusal to so find unless the evidence is such that all reasonable minds would so conclude and thus compel such a finding. *Park v. Alta Ditch & Canal Company*, 23 Utah 2d 86, 458 P.2d 625 (1969). Under the record of this case it would be absurd to say that the evidence compels such a finding. Accordingly, the Order of the trial court must in all respects be affirmed.

Respectfully submitted,

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